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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1936.

Nos. ~~865~~ [redacted] 23-24

IN THE MATTER OF FORTY-ONE THIRTY-SIX WILCOX BUILDING CORPORATION, A CORPORATION,

Debtor.

CHICAGO TITLE AND TRUST COMPANY, A CORPORATION, AS SUCCESSOR TRUSTEE UNDER THE TRUST DEED RECORDED AS DOCUMENT No. 10325493,

Petitioner,

vs.

FORTY-ONE THIRTY-SIX WILCOX BUILDING CORPORATION, A CORPORATION,

Respondent.

Answer and Brief in Opposition to Petition for Writ of Certiorari.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1936.

Nos. 865-866.

IN THE MATTER OF FORTY-ONE THIRTY-SIX WILCOX BUILDING CORPORATION, A CORPORATION,

Debtor.

CHICAGO TITLE AND TRUST COMPANY, A CORPORATION, AS SUCCESSOR TRUSTEE UNDER THE TRUST DEED RECORDED AS DOCUMENT NO. 10325493,

Petitioner,

vs.

FORTY-ONE THIRTY-SIX WILCOX BUILDING CORPORATION, A CORPORATION,

Respondent.

Answer and Brief in Opposition to Petition for Writ of Certiorari.

STATEMENT OF FACTS.

As a correction of the statement of facts of petitioner, we wish to call the Court's attention to the statement made on page 5 of said petition, wherein it is alleged that the present Stockholders acquired the Stock shortly before the filing of the Petition under Section 77B. This Statement is not true. The Stock of the Corporation was always

owned and held by the Schulman family. The only transfer that was made was the transfer of the father's Stock to the Daughter, to secure a Loan that she made to him; that the Stock represented an investment of $30,000.00 to $35,000.00 (Rec. 18-24).

I.

The State Courts have held that a corporation dissolved for failure to pay franchise tax, may continue to live for the purpose of being liquidated.

In Petitioner's first point of its argument, it questions the right of a dissolved Corporation to file its Petition for Corporate Reorganization under Section 77B of the Bankruptcy Act, after the expiration of the period provided by the Laws of its creation for the winding up of its affairs.

That a Corporation may continue to live, though dissolved, for the purpose of being liquidated, has been recognized by the Supreme Court of the State of Illinois.

In the case of *Life Association of America* v. *Fassett*, 102 Ill. 314, the Court there held:

At Page 323:

> "With a view of mitigating the rigor of the Common Law with respect to the effects of a defunct Corporation, the Legislature of this and most, if not all, of the other States of the Union, have, by appropriate Legislative enactment, provided for a just and equitable distribution of their assets in insolvency, or the sudden dissolution from any cause * * *"

At Page 324:

> "From these and other provisions of the Statute, it clearly appears that it is part of the settled policy of the State, at least so far as the Domestic Corporations are concerned, that upon their dissolution, how-

ever they may be effected, they shall, nevertheless, be regarded as still existing for the purpose of settling up their affairs and having their property applied for the payment of their debts * * *."

At Page 325:

"Whatever may be the effect of a Decree of dissolution in the State creating the corporation, it may, nevertheless, be regarded as at least a *de facto* corporation here, for the purpose of enabling creditors to reach its effects in this State."

II.

Pending litigation may keep a corporation alive, though same may have been dissolved, as long as that litigation remains pending.

In the case of *Singer and Talcott Co.* v. *Hutchinson*, 176 Ill. 48, the Supreme Court of the State of Illinois held that a Corporation, though dissolved for a period of more than two (2) years after the entry of the Decree of Dissolution, may still continue its existence, so that a Writ of Error to the Supreme Court of the State of Illinois could be brought for the purpose of reversing a Judgment rendered against it, the Court holding:

"* * * This Corporation was kept alive for the purpose of being made a party to the original action, and, being so alive for such purpose, is preserved by the Practice Act with authority to prosecute an Appeal or Writ of Error."

It will be noted that a Writ of Error is a new and separate suit, and is brought independent of the original action. Thus, the Supreme Court of the State of Illinois itself recognizes the existence of a Corporation, and treats with same as a Corporation though dissolved by Decree, and though two years had elapsed since its dissolution.

III.

Under the Constitution, and pursuant to the Acts of Congress, the Bankruptcy Courts have exclusive and paramount jurisdiction of the estate of insolvent debtors, and nothing done by State Courts may curtail, limit, impede or defeat that jurisdiction.

In re: *Williams* v. *Watts*, 190 U. S. 1, at 26 and 27:

> "* * * and the operation of the Bankruptcy Laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under State Statutes. The Bankruptcy Law is paramount and the jurisdiction of the Federal Courts in bankruptcy when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive."

In the case of *Cresson & Clearfield Coal & Coke Co.* v. *Stauffer*, 148 Fed. 981, the court held:

> "It has often been held that, even where a charter expires by time, its existence will be considered as being extended for the purpose of winding up its affairs, securing creditors and satisfying the ends of justice, even without special statutory authority for that purpose, and we think that the paramount authority of the Federal Bankruptcy Law is sufficient to keep alive the Corporation in this case for the purpose of the Bankrupt jurisdiction created by the said act, and to give efficacy to the admission made by the directors of the insolvent corporation as an act of Bankruptcy."

In the case of *Stark Lumber Co.*, 114 Fed. 360, the Court held, at Page 361:

> "The question raised by this motion to quash is not clear of difficulty, but it seems that it must be solved

by applying the broad principle that the National Bankruptcy Law is to govern the administration of the Estate of all insolvent debtors who are within its provisions and supersedes all the State Laws having the like object, when its provisions are invoked by the requisite creditors, and acts of Bankruptcy are proven."

In the case of *Hammond, et al.* v. *Lyon Realty Co.*, 59 Fed. (2nd) 592, No. 3290, 4th Circuit, June 13, 1932, at Page 593:

"* * * And it would certainly be contrary to the spirit of the National Bankruptcy Act to hold that insolvent corporations are excluded, by dissolution, from the scope of its provisions, and that the distribution of their assets and the final settlement of their affairs must be left to the State Courts."

At Page 895:

"There was no lack of power in Congress, and there can be no question as to its intent by the use of the term 'corporation' in Section 4B to include not only corporations in the literal sense, but also those bodies, which having once been true corporations, might be dissolved after insolvency by the State Courts. * * * The conclusion is irresistible that Congress did not intend to leave the affairs of dissolved corporations to the State Courts, but intended to include them within the terms of Section 4B."

Counsel for Petitioner, in their Brief, page 16, state:

"*Recognition of the legal extinction of the respondent under the Law of Illinois would not defeat the jurisdiction of the Federal Courts to administer the affairs of an insolvent Corporation, as the Circuit Court of Appeals holds.* The Law of Illinois provided a rea-

sonable period (two years) for winding up the affairs of a defunct corporation and during that time respondent (or its creditors) could have applied to the Bankruptcy Court of relief." (Italics ours.)

Thus, counsel concede the proposition that the mere dissolution of the Corporation would not preclude it from filing a Petition to have its assets administered in the Bankruptcy Court, but contend that same must be done within the limitation of time fixed by the State Legislature.

If that were to be held the Law, what control would the Bankruptcy Courts have as to the time limit fixed by the State Legislature? What could prevent the State Legislature from reducing the two year period to one (1) year, six (6) months or one (1) day.

This, in fact was done, for in the present Corporation Act of the State of Illinois, passed by the State Legislature in 1933, no time is allowed a dissolved corporation from instituting any action at all. Only creditors are allowed two (2) years to institute action against the Corporation. 1935 Illinois Revised Statutes, Chapter 32, Section 94.

"The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the Secretary of State, or (2) by the decree of the Court of equity when the court has not liquidated the assets and business of the corporation, or (3) by expiration of its period of duration, shall not take away or impair any remedy given *against* such corporation, its directors, or shareholders, for any liability incurred prior to such dissolution if suit therein is brought and service of process had within two (2) years after the date of such dissolution. Such suits may be prosecuted against and defended by the corporation in its corporate name." (Italics ours.)

IV.

The Illinois Statute, fixing a two (2) year limitation upon dissolved corporations to wind up their affairs and liquidate their assets, curtails and limits the powers and jurisdiction of the Bankruptcy Courts.

In the case of *311 E. Delaware Place Building Corporation,* 76 Federal (2nd) 834, the Court held:

"Passing without comment the petition of the Receiver in failing to protect the corporation for which he was in part acting and assuming as between the State and the said corporation, the latter was not *in esse,* it by no means follows the Bondholders could not treaf the corporation as an entity, subject to the adjudication under the Bankruptcy Act, or under Sections 77A and 77B of said Act.

That corporation, thus dissolved, exists for certain purposes, Smith & Hurd Revised Statute, Ill., 1931, Chap. 32, Secs. 14 and 79, Cahill's Revised Statutes, Illinois, 1931; Chap. 32, Secs. 14 and 79, one of which is to have its estate administered in a Court of Bankruptcy, is the holding of the courts that have passed on this question.

Hammond, et al. v. *Lyon Realty Co.,* (C. C. A.) 59 Fed. (2nd) 592; *In re Double Star Brick Company,* (D. C.) 210 Fed. 980; *In re Munger Vehicle Tire Company,* (C. C. A.) 159 Fed. 910; *In re Stork Lumber Co.,* (C. D.) 114 Fed. 360. • • •

It is not necessary to invoke the equities which exist in such cases, to reinforce the reasons for the adoption of the rule announced in the above cited cases, to the effect that the dissolution of the corporation, through forfeiture of the charter, because of failure to pay taxes, does not deprive the United States Dis-

trict Court of jurisdiction to administer the estate of such corporations in accordance with the Bankruptcy Act."

In the instant case, from the Opinion of Judge Lindly, the Court stated (R. 111) 86 Fed. (2nd) 667:

"Remembering that under the Constitution, the national government, through its judiciary, pursuant to acts of Congress, has exclusive and paramount jurisdiction of the estates of insolvent persons, it follows that nothing done by a state court may curtail, limit, impede or defeat that jurisdiction. Jurisdiction in bankruptcy under the federal constitution comes into existence, we take it, simultaneously with the coming into existence of insolvency of the Debtor."

V.

No conflict exists between the 6th Circuit and 7th Circuit by virtue of the decision by the District Court in the instant case.

The only point of Law determined by the lower Court in the instant case was that the two (2) year period within which a Corporation may wind up its affairs and liquidate its assets, as provided by the State Statute, (Illinois Smith & Hurd's Revised Statute, 1931, Chap. 32, Secs. 14 and 79) would not be binding on the Bankruptcy Courts, so as to deprive the Bankruptcy Courts from taking jurisdiction of the Debtor's assets, although said corporation had been dissolved for a period of more than two (2) years prior to the filing of the Petition. Petitioner urges that this decision is in conflict with the decision rendered by the 6th Circuit, in the case of *Vassar Foundry Company* v. *Whiting Corporation*, 2 Fed. (2nd) 240.

This case is clearly not in conflict with the decision in the case at bar. In that case, the Directors of the Vassar Foundry Company, then being solvent, elected to and did file a voluntary petition for dissolution of their Corporation. Thereafter a Receiver was appointed by the State Court, who took possession of all Debtor's assets, for the purpose of liquidating these assets in accordance with the Law of that State. The Stockholders and Directors abandoned completely any semblance of a corporate entity. Then, after accomplishing this liquidation, an attempt was made to file a voluntary petition in Bankruptcy, as a corporation, which Petition was denied, not because it was a dissolved corporation, but merely because there was nothing of which the Court could take jurisdiction, the Court there holding, Page 241:

> "This conclusion does not leave an open door for insolvent Michigan Corporations to escape Bankruptcy, such dissolution action, as was had, taken, if by a corporation then insolvent, within the Bankruptcy Act definition, would seem to be an act of Bankruptcy."

In a recent case, *Capital Endowment Co.* v. *Kroeger*, 86 Fed. (2nd) 976, the 6th Circuit had occasion to pass on the very question involved here. In this case the Attorney General of the State of Ohio instituted *quo warranto* proceedings to oust the Capital Endowment Company from its corporate franchise, and a decree was entered dissolving the corporation. Thereafter the corporation filed its voluntary Petition for reorganization under Section 77B of the Bankruptcy Act.

Kroeger questioned the right of the corporation to file a Voluntary Petition after it was dissolved. The Court held:

> "The order of ouster entered against the Debtor in the *quo warranto* proceedings by the Ohio Supreme

Court cannot defeat the jurisdiction of the Bankruptcy Court over the assets of the corporation. *Austin* v. *Thomas,* 78 F. (2d) 602 (C. C. A. 6); *Hammond* v. *Lyon Realty Co.,* 59 F. (2d) 592 (C. C. A. 4)."

The sixth district also affirmed this principal in the case of *Austin* v. *Thomas,* 78 Fed. 602.

The conflict of authority that counsel for petitioner contended that existed between the 6th and 7th Circuit has been disposed of clearly and definitely by the 6th Circuit itself, wherein the 6th Circuit held that the dissolution of the Corporation would not bar the Bankruptcy Court from taking jurisdiction on a Voluntary Petition.

VI.

The question of whether a corporation has any assets for the purpose of liquidation or reorganization under Section 77B of the Bankruptcy Act is one of fact and not of law, and is determined on the hearing as to whether the petition is filed in good faith.

The Petition states that the Debtor is without assets and therefore the Federal Court has no right to take jurisdiction of this Corporation.

Counsel for petitioner contends that the Corporation has a mere naked title to its Real Estate, from which it is liable to be divested, by vitrue of Master's Certificates which have been issued on two Mechanic Lien Foreclosure cases.

We contend that where no Master's Deeds have issued on the Certificates of Sale, that Title to Debtor's property is still in the Debtor, subject at any time to the right of the holder of said Certificates of Sale to have Deeds

issued, and if this right is not exercised within five (5) years after the issuance of said Certificates of Sale that said Certificates become void and of no effect. (1935 Illinois Revised Statutes, C. 77, S. 31.)

Title to the property has always been in the Corporation. It was never divested of it. The assignment of the Certificates to the Debtor Corporation constituted merely a merger of interests in the real property and a cancellation of the lesser interest, which are the Certificates of Sale. Since these Certificates have been cancelled, the question as to what effect they could have on the title and assets of the Debtor Corporation, is a moot one. These Certificates are no longer in existence, and all rights under them have been terminated, and therefore the Corporation is now the absolute owner of the title to its real estate.

The question of assets is one of fact and not of Law, and this question was heard before the Master to whom the cause was referred, as to whether the Petition was filed in good faith. The Master heard all of the evidence pertaining to the question of the good faith in the filing of this Petition and recommended to the Court that an Order be entered declaring that the Petition was filed in good faith (Rec. 70). This recommendation of the Master was again reviewed by the lower Court, and the question of assets of the Corporation was again passed on by the lower Court, and the Court again found that the Petition was properly filed and in good faith (Rec. 79). This same question was again reviewed in the Circuit Court of Appeals, and the same questions were raised and again the Circuit Court of Appeals passed on the question and in its opinion stated (Rec. 112):

> "Appellant complains of the finding that the Petition was filed in good faith. The court overruled the

exceptions to the findings and approved the Master's report, and we cannot see, upon examination of the Record, that the facts did not exist justifying the action of the court."

In the case of *Central Funding Corporation,* 75 Fed. (2nd) 256, at Page 261, the Court stated:

"It makes no difference whether the Debtor has an equity of any value or not, or whether his business is to continue for five or ten years, or indefinitely. The most frequent occasion for a reorganization is where only creditors' rights are to be adjusted and liquidation is to be slow enough to take advantage of market conditions obtaining over a long period.

Section 77B expressly provides for such situations as we have here, and they are proper subjects for Bankruptcy legislation. To restrict the Act of reorganizations where the Debtor has an equity, would be to deprive the section of much, if not most of its usefulness."

It has often been held by this Court that where two Courts concur, unless clear error is shown, this Court will accept its finding.

Pick Manufacturing Company v. *General Motors Corporation,* 57 Supreme Court Reporter, 1, 2 and cases therein cited.

In the instant case both the lower Court and the Circuit Court of Appeals held that the Petition in the instant case was filed in good faith, and that it had assets and property that could be reorganized in these proceedings.

Counsel in their Petition cite numerous cases on the effect of the dissolution of a Corporation by State Decree, but none of the authorities cited by counsel pertains to the right of the Bankruptcy Court to assert its jurisdic-

tion over the assets of a dissolved corporation, and therefore are not applicable to the facts involved herein.

Under Rule 38, and the cases therein cited for its exposition, it is clear that a Petition for Certiorari is not to be used merely as a device for affording "the defeated party in the Circuit Court of Appeals another hearing" (*Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163); rather it should be said it is properly invoked only to review "cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Court of Appeals" (*Layne & Bowler* v. *Western Well Works*, 261 U. S. 387, 392). The present case comes under neither head.

We therefore respectfully submit that no conflict of authorities exist and that the decision of the lower Court, and the opinion of the Circuit Court of Appeals, 7th Circuit, are in conformity with all of the authorities pertaining to the questions involved; that all of the matters set forth in the Petition have been completely heard and reviewed by the United States Circuit Court of Appeals; that the Petition discloses no ground for invoking the Writ of Certiorari and that the Petition herein should be denied.

Respectfully submitted,

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